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No. 85-414

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. AMBROSE,

Petitioner,

AND ALL OTHER PERSONS SIMILARLY SITUATED,

vs.

SPERRY (RAND) CORPORATION, a Delaware Corporation; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and LOCAL UNION NO. 2047 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents,

J. RICHARD BLAND, ESQ., BRADLEY M. JONES, ESQ., and RICHARD A. WILLIAMS, ESQ.,

Respondent(s). (class counsel).

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

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THE PARTIES

(as listed by Sperry, et al.)

Delores E. Elliott	Plaintiff
Helen Ambrose	Plaintiff-Petitioner
Class of all other persons similarly situated	Plaintiffs
Sperry (Rand) Corporation	Defendant-Respondent
The International Brotherhood of Electrical Workers, AFL-CIO	Defendant-Respondent
Local Union No. 2047 of the International Brotherhood of Electrical Workers	Defendant-Respondent

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REPLY TO ISSUES FIRST RAISED BY RESPONDENTS

Respondent Sperry claims that the Ambrose petition represents a collateral attack on the settlement orders; argues that the petition should be treated as a motion under Rule 60(b); and then claims that the motion comes one and one half years too late and after the Eighth Circuit has issued its approval and after all parties had "irretrievably" relied upon the final settlement terms; and claims that the motion must be filed within one year; that action by the court is discretionary; that the Circuit Court will not disturb that discretionary exercise absent abuse; and, inter alia, that a too liberal application of Rule 60 will undermine finality of judgment(s) and would discourage settlement of (class) action(s). (See Sperry brief at pages 5 and 6). The respondent counselor's brief argues similarly at pages 10 to 13. Each respondent as well as the lower courts call for final judgment.

Petitioner would that the Court find that finality in judgment did occur upon the occasion of the motion for class certification. That in the positions taken, statements made, briefs filed and orders issued by the (defendant and plaintiff counsel, the District Court and the Eighth Circuit Court), on the issue of class representation under Rule 23(a)(4) as to conflicts of interest, the aforesaid parties are judicially estopped from later taking a contradictory or inconsistent position. The foregoing would include: the brief by plaintiff counsel; the Sperry petition and brief for Writ of Mandamus; District Court Memorandum of May 27, 1976; the Eighth Circuit Order of May 11, 1977; and any and all briefs filed by the I.B.E.W. union(s).

Simply put, it is established through the doctrine of judicial estoppel that the counselors (and their law firms)

and the lower courts having established their positions on the question of conflicts of interest under Rule 23(a)(4) may not later in litigation take a contradictory position.

> "Under the doctrine of 'judicial estoppel' a party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving same issues and parties." *Sailes v. Jones,* 17 Ariz. App. 593, 499 P.2d 721, 726.
>
> "Under this doctrine, a party who by his pleadings, statements or contentions, under oath, has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent action." *Yarber v. Pennell,* Tex. Civ. App., 443 S.W. 2d 382, 384.

The extreme contradictions by Respondent Sperry and the I.B.E.W. union(s) are immediately recognized by the vigorous union briefs and the Writ of Mandamus used by Sperry when attacking the right of named plaintiffs to represent the class, but then accepted the re-association of the Hvass law firm whom they knew held interests adverse to that of the class. In 1976, the brief filed by J. Richard Bland and W. D. Flaskamp of the Meagher, Geer, et al, law firm, defended the representative status of named plaintiffs at pages 13 and 15 of said brief. Today they attack and they have adopted the same material and same vituperative style as the union(s) used in 1976. Their contradictions are impermissable but understandable because they are now defending their million dollar fee and cost award and in 1976 they needed a "key" to the court house door.

But even more profound is the inconsistent and contradictory conduct engaged in by the District Court and the Circuit Court. Petitioner has supplied that information

sufficiently in the Petition to the Court at pp. 6, 7, 8, 16, 17, 22, and 23 and has characterized the lower court's inconsistent or contradictory conduct as a repudiation of its Memorandum Order of May 27, 1976. To put it as succinctly as I can, the courts below established rules and criteria to be applied to Rule 23 class representatives but failed to apply them fairly and reasonably to named plaintiffs and to counselors at bar. Thus, petitioner and all class members were denied the fundamental right to a fair trial, effective counsel and an impartial tribunal. See *Brown v. United States,* 377 F. Supp. 530 (1974) at p. 531: "It is basic due process that the government cannot set up regulations and then disregard them."

By the act(s) of applying Rule 23(a)(4) strictly, and subjecting named plaintiffs to close and continuing scrutiny but failing to subject Hvass, et al, to the same tests, the court acted in abuse of discretion, beyond the law and beyond the constraints of the Rules Enabling Act of 1966. In the commission of that first abuse of discretion (silently acquiescing in the Hvass re-association and failure to notify the class) the court should be found to be without jurisdiction as to this litigation. See: *Wheeler v. New Brunswick & C.R. Co.,* 115 U.S. 2a, 5 S.Ct. 1061: "Silence is equivalent to a concealment, where it is the duty of a party to speak". See also: *Tyler v. Savage,* 143 U.S. 79, 12 S.Ct. 340: "The suppression of a material fact which a party is bound to disclose is equivalent to a false representation."

In view of the above, petitioner believes that the courts below and the respondents here are ill posed to call for finality of judgment now. Petitioner respectfully requests that the Court would give remedy to all class members and to petitioner under the Supreme Court Rule 17 1(a) by finding that the District Court and the Eighth Circuit

> has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Respondents raise the issue of the monetary awards accepted by the class members. The claim is made that if settlement is set aside the class members may be required to return such monies; that Sperry may revert back to their pre-1972 disparate treatment of women; and that the best interests of the class have been served. Respondents also contend that Petitioner believes or expects Title VII to be a panacea and claim that litigation was a "contest".

Though Sperry parades before the Court that 3,105 women received a monetary award of $1,762,618.47 the Court may better measure the contentment of those women by reflecting on the fact that the net individual awards ranged from about $30.00 to $1,090.00. Not paraded before the Court was the one million dollar attorney fee and cost award. To suggest that class members may be required to return monies is tantamount to saying that victims of fraud and concealment are required to make their victimizer whole. See: *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231 (1959). Mr. Justice Black:

> "To decide this case we need look no further than the maxim that no man may take advantage of his own wrong. . . ."

That Sperry would plunge back into its pre-1972 discriminatory practices is to accept that they have "emerged" and it also suggests that the plaintiff class would have prevailed on back pay claims. See also Ambrose Appendix at A-95-96, the 1982 sex discrimination grievance.

Petitioner does *not* review Title VII as a "panacea" but rather understands Title VII to be a statute framed in equity giving courts broad powers in framing remedy deemed to be due and appropriate based upon discovery made through zealous advocacy of loyal lawyers brought before an impartial tribunal. We had neither the lawyers giving undivided loyalty nor an impartial tribunal. It was *no* contest.

CONCLUSION

This case presents issues of important public policy. This Court should grant the Petition for Certiorari or in the alternative remand for all appropriate remedy for the class and in the public interest.

October 14, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Petitioner hereby certifies that copies of this brief will be served upon all parties of interest by U.S. certified-registered mail on this 16th day of October, 1985.

/s/ HELEN M. AMBROSE
Helen M. Ambrose